

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, et al.,

**Plaintiffs,**

V.

STATE OF WASHINGTON, et al.,

## Defendants.

CASE NO. CV 9213RSM  
Subproceeding No. 01-01

## ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter was initiated by a Request for Determination (“Request”) filed in 2001 by plaintiffs Suquamish Indian Tribe, Jamestown S’Klallam, Lower Elwha Band of Klallam, Port Gamble Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribe, Lummi Indian Nation, Quinault Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Bands and Tribes of the Yakama Indian Nation, Quileute Indian Tribe, Makah Nation, and Swinomish Tribal Community (hereafter, “the Tribes”). It is now before the Court for consideration of cross-motions for summary judgment filed by defendant State of Washington (“State”) and by the plaintiff Tribes.<sup>1</sup> Dkt. ## 287, 295. Oral argument was heard on the motions on February 1, 2007. The parties were then referred to the Honorable J. Kelley Arnold, United Magistrate Judge, for a settlement conference. The Court was advised on May 10, 2007 that the mediation was unsuccessful, and the matter was ripe for issuance of a decision on the summary judgment motions. The matter is set for trial on September 24, 2007.

The memoranda, exhibits, and arguments of the parties have been fully considered by the Court,

<sup>1</sup>Plaintiff United States of America has substantially joined in the Tribes' opposition to the State's motion. Dkt. # 313.

1 as has the prior case history. For the reasons set forth below, the Court shall grant the Tribes' motion for  
 2 partial summary judgment, and shall deny the summary judgment motion filed by the State of  
 3 Washington.

4 **BACKGROUND**

5 This is a designated subproceeding of *United States, et al., v. State of Washington, et al.*, C70-  
 6 9213. The United States, in conjunction with the Tribes, initiated this sub-proceeding in early 2001,  
 7 seeking to compel the State of Washington to repair or replace any culverts that are impeding salmon  
 8 migration to or from the spawning grounds. The Request for Determination, filed pursuant to the  
 9 permanent injunction in this case, maintains that the State has a treaty-based duty to preserve fish runs so  
 10 that the Tribes can earn a "moderate living". The State's original Answer asserted cross- and counter-  
 11 Requests for Determination, claiming injunctive and declaratory relief against the United States for  
 12 placing a disproportionate burden of meeting the treaty-based duty (if any) on the State. The State also  
 13 asserted that the United States has managed its own lands in such a way as to create a nuisance that  
 14 unfairly burdens the State.

15 In 2001, the United States moved to dismiss the counterclaims, contending that it has not waived  
 16 sovereign immunity with respect to these claims, and that the State lacks standing to assert tribal rights  
 17 derived from the Treaties. The Court originally denied the motion to dismiss, but upon reconsideration  
 18 the motion to dismiss the counterclaims was granted. The Court found that it lacked jurisdiction over the  
 19 State's counterclaims because sovereign immunity has not been waived. A subsequent motion by the  
 20 State for leave to file an amended Answer asserting counter-claims was denied. These cross-motions for  
 21 summary judgment followed.

22 The parties have cooperated fully with one another throughout these proceedings, including  
 23 discovery and settlement negotiations. They agree that material facts are not in dispute. Nevertheless,  
 24 they have been unable to arrive at a settlement, and now ask the Court to resolve the legal issues  
 25 presented.

26 **DISCUSSION**

27 This subproceeding arises from the language in Article III of the 1855 Treaty of Point Elliot  
 28 ("Stevens Treaties") in which the Tribes were promised that "[t]he right of taking fish, at all usual and

1 accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the  
 2 Territory . . . ” Dkt. # 287-2. The Tribes, in their Request for Determination, state that they brought  
 3 this action

4 to enforce a duty upon the State of Washington to refrain from constructing and maintaining  
 5 culverts under State roads that degrade fish habitat so that adult fish production is reduced,  
 6 which in turn reduces the number of fish available for harvest by the Tribes. In part due to  
 7 the reduction of harvestable fish caused by those actions of the State, the ability of the Tribes  
 8 to achieve a moderate living from their Treaty fisheries has been impaired.

9 Request for Determination, Dkt. # 1, p. 1.

10 The Tribes requested mandatory relief “requiring Washington to identify and then to open culverts  
 11 under state roads and highways that obstruct fish passage, for fish runs returning to or passing through  
 12 the usual and accustomed grounds and stations of the plaintiff tribes.”<sup>2</sup> *Id.* Specifically, they request a  
 13 declaratory judgment, establishing that (1) the right of taking fish secured by the Treaties imposes a duty  
 14 upon the State of Washington to refrain from diminishing the number of fish passing through, or to or  
 15 from, the Tribes’ usual and accustomed fishing grounds by improperly constructing or maintaining  
 16 culverts under State-owned roads and highways; and that (2) the State has violated, and continues to  
 17 violate, the duty owed the Tribes under the Stevens Treaties. Further, the Tribes request a prohibitory  
 18 injunction, prohibiting the State of Washington and its agencies from constructing or maintaining any  
 19 culverts that reduce the number of fish that would otherwise return to or pass through the usual and  
 20 accustomed fishing grounds of the Tribes. Finally, they request a mandatory injunction, requiring the  
 21 State to (1) identify, within eighteen months, the location of all culverts constructed or maintained by  
 22 State agencies, that diminish the number of fish in the manner set forth above, and (2) fix, within five  
 23 years after judgment, and thereafter maintain all culverts built or maintained by any State agency, so that  
 24 they do not diminish the number of fish as set forth above. *Id.*, pp. 6-7.

25 The State has moved for summary judgment as to all aspects of the Request. The Tribes have  
 26 moved for partial summary judgment as to the declaratory judgment portion of their Request. Shortly  
 27 before the February 1, 2007 hearing, the parties stipulated to define the scope of this subproceeding to

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28 <sup>2</sup>According to testimony and exhibits provided by the Tribes, culverts may become impassable to  
 29 fish either because they are blocked by silt or debris, or because they are “perched”—that is, the outfall of  
 30 the culvert is several feet or more above the level of the stream into which it flows. Salmon migrating  
 31 upstream to spawn are stopped by a perched culvert and cannot reach their spawning grounds.

1 include “only those culverts that block fish passage under State-owned roads.” Dkt. # 341. Therefore,  
 2 culverts that do not actually block fish passage, as well as tidegates, are not within the scope of this  
 3 subproceeding. *Id.*

4 The Tribes, in their Request, assert that between 1974, the year that this case was originally  
 5 decided, and 1986, Tribal harvests of anadromous fish (salmon and steelhead) rose dramatically,  
 6 eventually reaching some 5 million fish. Then harvests declined, so that by 1999 harvests were back  
 7 down to the 1974 levels.<sup>3</sup> The Tribes contend that “[a] significant reason for the decline of harvestable  
 8 fish has been the destruction and modification of habitat needed for their survival.” Request for  
 9 Determination, Dkt. # 1, ¶¶ 2.5, 2.6, 2.7.

10 The Request addresses one specific type of habitat modification: the placement of culverts rather  
 11 than bridges where roadways cross rivers and streams. The Tribes allege that when such culverts are  
 12 improperly built or maintained, they block fish passage up or down the stream, “thereby preventing out-  
 13 migration of juvenile fish to rearing areas or the salt water, or the return of adult fish to spawning beds,  
 14 or both.” *Id.*, ¶ 3.1. According to the Tribes, culverts under State-owned or maintained roads block  
 15 fish access to at least 249 linear miles of stream, thus closing off more than 400,000 square meters of  
 16 productive spawning habitat, and more than 1.5 million square meters of productive rearing habitat for  
 17 juvenile fish. *Id.*, ¶ 3.7. The Tribes state that, by the State’s own estimates, removal of the obstacles  
 18 presented by blocked culverts would result in an annual increase in production of 200,000 fish, many of  
 19 which would be available for Tribal harvest. *Id.*, ¶ 3.8.

20 The State does not dispute the fact that a certain number of culverts under State-owned roads  
 21 present barriers to fish migration. The State notes that 18% of the culverts on land managed by the  
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23 <sup>3</sup>These figures are supported by the Declaration of Keith Lutz, a fisheries biologist with the  
 24 Northwest Indian Fisheries Commission, filed in support of the Tribes’ motion for partial summary  
 25 judgment. The table presented by Mr. Lutz indicates that harvest levels in 1974 and 1975 were 860,537  
 26 and 1,001,041 fish respectively. The number of fish harvested rose steadily to 5,494,973 in 1985.  
 27 Numbers of fish harvested then fluctuated between approximately three and four million fish for the next  
 28 several years, higher in the odd-numbered years when large numbers of pink salmon were harvested.  
 After 1991, harvests of four million fish were not seen again, and after the 1993 harvest of 3,497,537 fish  
 the numbers declined dramatically, dipping as low as 575,958 in 1999. While post-1999 harvest numbers  
 have risen somewhat, to 2,148,802 fish taken in 2003, the Tribal harvest through 2004 (the last year  
 reported in this exhibit) remained less than half that of the years 1985 to 1991. Declaration of Kieth  
 Lutz, Dkt. # 299.

1 Department of Natural Resources (“DNR”) were identified as barriers in a 2000 inventory. Washington  
 2 State Parks (“WDP”) have identified 120 culverts as fish passage barriers. And of the thousands of  
 3 culverts passing under roads maintained by the Washington State Department of Transportation  
 4 (“WSDOT”), the State asserts that “most”, but not all, allow free passage of migrating fish—meaning  
 5 that many do not.<sup>4</sup> Motion for Summary Judgment, pp. 8-11.

6 The State argues that the Tribes have produced no evidence that the blocked culverts  
 7 “affirmatively diminish[] the number of fish available for harvest”. State’s Reply, Dkt. # 319, p. 2. The  
 8 Tribes have, however, produced evidence of greatly diminished fish runs. While there may be other  
 9 contributing causes for this, the conclusion is inescapable that if culverts block fish passage so that they  
 10 cannot swim upstream to spawn, or downstream to reach the ocean, those blocked culverts are  
 11 responsible for some portion of the diminishment. It is not necessary for the Tribes to exactly quantify  
 12 the numbers of “missing” fish to proceed in this matter.

13 The issue then becomes a purely legal one: whether the Tribes’ treaty-based right of taking fish  
 14 imposes upon the State a duty to refrain from diminishing fish runs by constructing or maintaining  
 15 culverts that block fish passage. The State asserts that this question has already been answered, and the  
 16 Tribes’ position rejected, by the Ninth Circuit Court of Appeals. However, that is not a correct  
 17 characterization of the appellate court’s prior rulings in this matter.

18 In 1976, after the Tribes won recognition of their treaty-based right to a fair and equitable share  
 19 of harvestable fish in Phase I of this case, this Court turned to address environmental issues raised earlier.  
 20 One of two questions addressed by the Court in Phase II was “whether the right of taking fish  
 21 incorporates the right to have treaty fish protected from environmental degradation.” *United States v.*  
 22 *Washington*, 506 F. Supp. 187, 190 (1980). The district court held that “implicitly incorporated in the  
 23 treaties’ fishing clause is the right to have the fishery habitat protected from man-made despoliation.” *Id.*,  
 24 at 203. The Court then assigned to the State a burden “to demonstrate that any environmental  
 25 degradation of the fish habitat proximately caused by the State’s actions (including the authorization of

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27 <sup>4</sup>Although the State’s motion did not set the number, an expert declaration filed in support of the  
 28 Tribe’s motion found 1,113 barrier culverts in the combined jurisdiction of the WSDOT and the  
 Washington Department of Fish and Wildlife (“WDFW”), in addition to those included in the WDP and  
 DNR culvert counts. Declaration of Ronald McFarlane, Dkt. # 300, ¶ 8.

1 third parties' activities) will not impair the tribes' ability to satisfy their moderate living needs." *Id.* at  
 2 207.

3 The Ninth Circuit Court of Appeals reversed this portion of the district court's order, but not as  
 4 conclusively as the State suggests.

5 Let us repeat the essence of our interpretation of the treaty. Although we reject the  
 6 environmental servitude created by the district court, we do not hold that the State of  
 7 Washington and the Indians have no obligations to respect the other's rights in the resource.  
 8 Instead, . . . we find on the environmental issue that the State and the Tribes must each take  
 9 reasonable steps commensurate with the resources and abilities of each to preserve and  
 10 enhance the fishery when their projects threaten then-existing levels.

11 *United States v. Washington*, 694 F. 2d 1374, 1389 (9th Cir. 1982).

12 Upon request for rehearing *en banc*, the three-judge panel's opinion was vacated. *United States*  
 13 *v. Washington*, 759 F. 2d 1353, 1354 (9th Cir. 1985). A highly divided eleven-member court issued a  
 14 *per curiam* decision vacating the district court's declaratory judgment on the environmental issue. The  
 15 court's order did not contain broad and conclusive language necessary to reject the idea of a treaty-based  
 16 duty in theory as well as in practice. Instead, the Court found that the declaratory judgment on  
 17 environmental issues was imprecise and lacking in a sufficient factual basis.

18 We choose to rest our decision in this case on the proposition that issuance of the  
 19 declaratory judgment on the environmental issue is contrary to the exercise of sound  
 20 judicial discretion. The legal standards that will govern the State's precise obligations  
 21 and duties under the treaty with respect to the myriad State actions that may affect  
 22 the environment of the treaty area will depend for their definition and articulation  
 23 upon **concrete facts which underlie a dispute in a particular case**. Legal rules of  
 24 general applicability are announced when their consequences are known and understood  
 25 in the case before the court, not when the subject parties and the court giving judgment  
 26 are left to guess at their meaning. It serves neither the needs of the parties, nor  
 27 the jurisprudence of the court, nor the interests of the public for the judiciary to employ  
 28 the declaratory judgment procedure to announce legal rules imprecise in definition  
 and uncertain in dimension. Precise resolution, not general admonition, is the function of  
 declaratory relief. These necessary predicates for a declaratory judgment have not been met  
 with respect to the environmental issues in this case.

29 The State of Washington is bound by the treaty. If the State acts for the primary purpose or  
 30 object of affecting or regulating the fish supply or catch in noncompliance with the treaty as  
 31 interpreted by past decisions, it will be subject to immediate correction and remedial action  
 32 by the courts. In other instances, **the measure of the State's obligation will depend for its**  
 33 **precise legal formulation on all of the facts presented by a particular dispute.**  
*Id.* at 1357 (emphasis added).

34 The appellate court's ruling, then, cannot be read as rejecting the concept of a treaty-based duty  
 35 to avoid specific actions which impair the salmon runs. The court did not find fault with the district  
 36

1 court's analysis on treaty-based obligations, but rather vacated the declaratory judgment as too broad,  
 2 and lacking a factual basis at that time.<sup>5</sup> The court's language, however, clearly presumes some  
 3 obligation on the part of the State; not a broad "general admonition" as originally imposed by the district  
 4 court, but a duty which could be defined by concrete facts presented in a particular dispute. This  
 5 dispute, limited as it is to "only those culverts that block fish passage under State-owned roads", is  
 6 capable of resolution through the declaratory relief requested by the tribes. The Tribes have presented  
 7 sufficient facts, in the form of fish harvest data and numbers of blocked culverts, to meet the appellate  
 8 court's stated requirements for issuance of a declaratory judgment. A narrowly-crafted declaratory  
 9 judgment such as the one requested here does not raise the specter of a broad "environmental servitude"  
 10 so feared by the State.

11 In moving for summary judgment, the State also asserts that "[n]o treaty language supports  
 12 'moderate living' as the measure of any servitude". Motion for Summary Judgment, p. 16. The State  
 13 argues that the Tribes have proposed that the State has a duty to avoid impairing their ability to earn a  
 14 "moderate living", but no tribal member can define the term "moderate living". The State further asserts  
 15 that the term "moderate living" does not appear in the treaty, and that since the treaty is a contract, its  
 16 provisions must be definite in order to be enforceable. According to the State, "the term is inherently  
 17 ambiguous." Motion for Summary Judgment, p. 17.

18 The term "moderate living" was coined by the courts, not the parties. It is thus indeed not a part  
 19 of the treaty "contract"; it is an interpretation that has been applied by the courts. In *State of*  
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21 <sup>5</sup> Neither the majority opinion, nor any of the dissenting or concurring opinions rejected the  
 22 district court's analysis on treaty-based obligations. Indeed, three of the dissenting judges would have  
 23 affirmed the district court's declaratory judgment on environmental issues. Judge Nelson flatly stated, "I  
 24 agree with the district court that the Tribes have an implicit treaty right to a sufficient quantity of fish to  
 25 provide them with a moderate living, **and the related right not to have the fishery habitat degraded**  
 26 **to the extent that the minimum standard cannot be met. I also agree that the State has a**  
 27 **correlative duty to refrain from degrading or authorizing others to degrade the fish habitat in**  
 28 **such a manner.**" *Id.* at 1367 (emphasis added). Judge Skopil joined in this dissent. *Id.* Judge Norris  
 dissented "for the reasons articulated in Judge Nelson's dissenting opinion." *Id.* at 1368. Judges Sneed  
 and Anderson, who sat on the original three-judge panel and formulated the "reasonable steps" standard  
 set forth above, concurred in the opinion in the interests of collegiality, but did not retreat from the  
 position they took in hearing the case originally. *Id.* at 1360. Judges who concurred in the opinion did  
 so because of the absence or a case or controversy (Judges Ferguson and Schroeder), or because the  
 declaratory judgment was deemed not an appealable decision (Judge Sneed). And nowhere in the  
 majority opinion did the court state that no duty arises from the treaties.

1 *Washington, et al., v. Washington State Commercial Passenger Fishing Vessel Association, et al.*, 443  
 2 U.S. 658 (1979), the Supreme Court stated,

3 We also agree with the Government that an equitable measure of the common right  
 4 should initially divide the harvestable portion of each run that passes through a “usual  
 5 and accustomed” place into approximately equal treaty and nontreaty shares, and should  
 then reduce the treaty share if tribal needs may be satisfied by a lesser amount. . . .

6 The division arrived at by the District Court is also consistent with our earlier  
 7 decisions concerning Indian treaty rights to scarce natural resources. In those cases,  
 8 after determining that at the time of the treaties the resource involved was necessary  
 to the Indians’ welfare, the Court typically ordered a trial judge or special master,  
 9 in his discretion, to devise some apportionment that assured that the Indians’  
 reasonable livelihood needs would be met. *Arizona v. California*, 373 U.S. at 600. . . .

10 Thus, [the district court] first concluded that at the time the treaties were signed, the  
 11 Indians, who comprised three-fourths of the territorial population, depended heavily  
 12 on anadromous fish as a source of food, commerce, and cultural cohesion. Indeed,  
 it found that the non-Indian population depended on Indians to catch the fish that the  
 former consumed. Only then did it determine that the Indians’ present-day subsistence  
 and commercial needs should be met, subject, or course, to the 50% ceiling.

13 . . . . As in *Arizona v. California* and its predecessor cases, the central principal here  
 14 must be that Indian treaty rights to a natural resource that once was thoroughly  
 15 and exclusively exploited by the Indians **secures so much as, but no more than,**  
**is necessary to provide the Indians with a livelihood—that is to say, a moderate**  
**living.**

16 *Id.* at 686 (citations omitted) (emphasis added).

17 The State’s argument that the term “moderate living” is ambiguous and unenforceable in contract  
 18 terms is thus without merit. It is neither a “missing term” in the contract, nor a meaningless provision; it  
 19 is a measure created by the Court. To the extent that it needs definition, it would be for the Court, not  
 20 the Tribes, to define it. No party has yet asked that the Court do so, and the Court finds it unnecessary at  
 21 this time. The Tribes’ showing that fish harvests have been substantially diminished, together with the  
 22 logical inference that a significant portion of this diminishment is due to the blocked culverts which cut  
 23 off access to spawning grounds and rearing areas, is sufficient to support a declaration regarding the  
 24 culverts’ impairment of treaty rights.

25 In finding a duty on the part of the State to refrain from blocking fish access to spawning grounds  
 26 and rearing habitat, the Court has been guided by well-established principles of treaty construction.  
 27 These were set forth as they applied to the treaties at issue here by the Supreme Court in *State of*  
 28

1       *Washington v. Washington State Commercial Passenger Fishing Vessel Association.*

2       [I]t is the intention of the parties, and not solely that of the superior side, that must control  
 3       any attempt to interpret the treaties. When Indians are involved, this Court has long given  
 4       special meaning to this rule. It has held that the United States, as the party with the presumptively  
 5       superior negotiating skills and superior knowledge of the language in which  
 6       the treaty is recorded, has a responsibility to avoid taking advantage of the other side.  
 7       "[T]he treaty must therefore be construed, not according to the technical meaning of its words  
 8       to learned lawyers, but in the sense in which they would naturally be understood by the Indians."  
 9       This rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these  
 10      very treaties in the Indians' favor.

11      Governor Stevens and his associates were well aware of the "sense" in which the Indians  
 12      were likely to view assurances regarding their fishing rights. During the negotiations, the  
 13      vital importance of the fish to the Indians was repeatedly emphasized by both sides, and **the  
 14      Governor's promises that the treaties would protect that source of food and commerce were  
 15      crucial in obtaining the Indians' assent.** It is absolutely clear, as Governor Stevens himself  
 16      said, that neither he nor the Indians intended that the latter "should be excluded from their ancient  
 17      fisheries", see n. 9, *supra*, and it is accordingly inconceivable that either party deliberately agreed  
 18      to authorize future settlers to crowd the Indians out of any meaningful  
 19      use of their accustomed places to fish. That each individual Indian would share an "equal  
 20      opportunity" with thousands of newly arrived individual settlers is totally foreign to the spirit  
 21      of the negotiations. Such a "right", along with the \$207,500 paid the Indians, would hardly  
 22      have been sufficient to compensate them for the millions of acres they ceded to the Territory.  
 23      Moreover, in light of the far superior numbers, capital resources, and technology of the non-  
 24      Indians, the concept of the Indians' "equal opportunity" to take advantage of a scarce resource  
 25      is likely in practice to mean that the Indians' "right of taking fish" will net them virtually no catch  
 26      at all. . . .

15      *Id.* at 675-677 (citations omitted; emphasis in bold added, emphasis in italics in original).

16      After rejecting the State's "equal opportunity" theory, the Court went on to discuss the meaning  
 17      of "in common with" as used in the treaties.

19      But we think greater importance should be given to the Indians' likely understanding of the  
 20      other words in the treaties and especially the reference to the "right of *taking* fish"—a right  
 21      that had no special meaning at common law but that must have had obvious significance to  
 22      the tribes relinquishing a portion of their pre-existing rights to the United States in return for  
 23      this promise. This language is particularly meaningful in the context of anadromous  
 24      fisheries—which were not the focus of the common law—because of the relative predictability  
 25      of the "harvest". In this context, it makes sense to say that a party has a right to "take"—rather  
 26      than merely the "opportunity" to try to catch—some of the large quantities of fish that will almost  
 27      certainly be available at a given time.

24      . . . .

25      This interpretation is confirmed by additional language in the treaties. The fishing clause  
 26      speaks of "securing" certain fishing rights, a term the Court has previously interpreted as  
 27      synonymous with "reserving" rights previously exercised. Because the Indians had always  
 28      exercised the right to meet their subsistence and commercial needs by taking fish from treaty  
 29      area waters, they would be unlikely to perceive a "reservation" of that right as merely the  
 30      chance, shared with millions of other citizens, occasionally to dip their nets in to the territorial  
 31      waters.

1 *Id.* at 678-680 (citations omitted; emphasis in italics in original).

2 It was thus the right to **take** fish, not just the right to fish, that was secured by the treaties. The  
 3 significance of this right to the Tribes, its function as an incentive for the Indians to sign the treaties, and  
 4 the Tribes' reliance on the unchanging nature of that right, have been set forth in expert declarations  
 5 provided by the Tribes. Historian Richard White, Ph.D., who has researched the history of the Stevens  
 6 Treaties, including the intentions, expectations, and understandings of the negotiators on both sides,  
 7 states that

8 [o]ne vital part of the relations that Stevens sought to perpetuate was Indian fishing, both for  
 9 subsistence and for trade. Stevens and the other treaty negotiators knew well that Puget Sound  
 Indians relied heavily on their fisheries. . . .

10 . . . .  
 11 The Indians themselves expressed the importance of fishing to their way of life, and Stevens  
 12 and the other negotiators assured them of their continued access to the fisheries. Treaty  
 13 minutes record that at Point-No-Point, One-lun-teh-tat, an "Old Sko-komish Indian" worried  
 14 how they were to feed themselves once they ceded so much land to the whites, while Hool-  
 15 hole-tan-akim also wanted to retain half the land. "Why," he asked, "should we sell? We  
 16 may become destitute. Why not let us live together with you?" In the face of such objections,  
 17 Benjamin F. Shaw, the interpreter, reassured the Indians that they were "not called upon to  
 18 give up their old modes of living as places of seeking food, but only to confine their houses  
 to one spot." And Michael Simmons, the special Indian agent for Puget Sound, explained  
 that if they retained a large amount of land they would be confined to it, but that "when a  
 small tract alone was left, the privilege was given of going wherever they pleased to fish  
 and work for the whites." In negotiations at Neah Bay, the Makah raised questions about the  
 role that the fisheries were to play in their future. Stevens replied that "far from wishing to  
 stop their fisheries, he intended to send them oil, kettles and fishing apparatus." What  
 Stevens and his negotiators explicitly promised in response to Indian objections was access  
 to the usual places for procuring food and continued economic exchange with the whites.

19 . . . .

20 Stevens also sought to preserve Indian fishing rights to reduce the cost of implementing the  
 21 treaties. In his instructions to Stevens, Mix had emphasized that whatever the form of the  
 22 treaties, they should incur minimal expenses for the government. . . . As the Treaty  
 23 Commissioners noted in their meeting of December 26, 1854, "it was necessary to allow  
 them to fish at all accustomed places" because this "was necessary for the Indians to obtain  
 24 subsistence." And securing the Indians a subsistence was critical if Stevens was to follow  
 his very clear instructions to keep the cost of the treaty down. By guaranteeing the Indians  
 a right to their share of the bounty of the land, rivers, and Sound, the treaties would enable  
 them to feed themselves at little cost to the government.

25 Declaration of Richard White, Dkt. # 296, ¶¶ 8, 9, 11.

26 It was thus the government's intent, and the Tribes' understanding, that they would be able to  
 27 meet their own subsistence needs forever, and not become a burden on the treasury.

28 Stevens and the other negotiators believed that the abundant fisheries they had observed in

1 Puget Sound would continue unabated forever. Early white accounts of these fisheries  
 2 breathlessly reported that they were inexhaustible. . . . It was not until the 1890's that  
 3 scientists began to caution that salmon and other stocks might not remain abundant forever.

4 Stevens and the other negotiators anticipated that Indians would continue to fish the inexhaustible  
 5 stocks in the future, just as they had in the past. Stevens specifically assured  
 6 the Indians that they would have access to their normal food supplies now and in the future.  
 7 At the Point Elliot Treaty, Stevens began by speaking of subsistence. “[A]s for food, you  
 8 yourselves now, as in time past, can take care of yourselves.” The question, however, was  
 9 not whether they could now feed themselves, but rather whether in the future after the huge  
 10 cessions that the treaties proposed the Indians would still be able to feed themselves. Stevens  
 11 assured them that he intended that the treaty guarantee them that they could.

12 **“I want that you shall not have simply food and drink now but that you may have them  
 13 forever.”** The negotiators uniformly agreed on the abundance of the fisheries, the dependence  
 14 of the Indians upon them, their commercial possibilities, and their future “inexhaustibility.”  
 15 Stevens and Gibbs could both foresee and promote the commercial development of the  
 16 territory, the creation of a commercial fishery by whites, and the continuation of an Indian  
 17 fishery. They did not see any contradiction between them.

18 *Id.* at ¶¶ 13, 14 (emphasis added).

19 Thus, the Tribes were persuaded to cede huge tracts of land—described by the Supreme Court as  
 20 “millions of acres”---by the promise that they would forever have access to this resource, which was  
 21 thought to be inexhaustible. It was not deemed necessary to write any protection for the resource into  
 22 the treaty because nothing in any of the parties’ experience gave them reason to believe that would be  
 23 necessary. According to historian Joseph E. Taylor II, Ph.D.,

24 [d]uring 1854-1855, white settlement had not yet damaged Puget Sound fisheries. During  
 25 those years, Indians continued to harvest fish for subsistence and trade as they had in the past.  
 26 Given the slow pace of white settlement and its limited and localized environmental impact,  
 27 Indians had no reason to believe during the period of treaty negotiations that white settlers  
 28 would interfere, either directly through their own harvest or indirectly through their environmental  
 29 impacts, with Indian fisheries in the future. During treaty negotiations,  
 30 Indians, like whites, assumed that their cherished fisheries would remain robust forever.

31 Declaration of Joseph Taylor III, Dkt. # 297, ¶ 7.

32 As Professor White stated, the representatives of the Tribes were personally assured during the  
 33 negotiations that they could safely give up vast quantities of land and yet be certain that their right to take  
 34 fish was secure. These assurances would only be meaningful if they carried the implied promise that  
 35 neither the negotiators nor their successors would take actions that would significantly degrade the  
 36 resource. Such resource-degrading activities as the building of stream-blocking culverts could not have  
 37 been anticipated by the Tribes, who themselves had cultural practices that mitigated negative impacts of  
 38 their fishing on the salmon stocks. Declaration of Robert Thomas Boyd, Dkt. # 298, ¶ 6.

1        In light of these affirmative assurances given the Tribes as an inducement to sign the Treaties,  
2 together with the Tribes' understanding of the reach of those assurances, as set forth by the Supreme  
3 Court in the language quoted above, this Court finds that the Treaties do impose a duty upon the State to  
4 refrain from building or maintaining culverts in such a manner as to block the passage of fish upstream or  
5 down, to or from the Tribes' usual and accustomed fishing places. This is not a broad "environmental  
6 servitude" or the imposition of an affirmative duty to take all possible steps to protect fish runs as the  
7 State protests, but rather a narrow directive to refrain from impeding fish runs in one specific manner.  
8 The Tribes have presented sufficient facts regarding the number of blocked culverts to justify a  
9 declaratory judgment regarding the State's duty to refrain from such activity. This duty arises directly  
10 from the right of taking fish that was assured to the Tribes in the Treaties, and is necessary to fulfill the  
11 promises made to the Tribes regarding the extent of that right.

## CONCLUSION

13       Accordingly, the State's motion for summary judgment is DENIED. The Tribes' cross-motion  
14 for partial summary judgment is GRANTED. The Court hereby declares that the right of taking fish,  
15 secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or  
16 operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number  
17 of fish that would otherwise be available for Tribal harvest. The Court further declares that the State of  
18 Washington currently owns and operates culverts that violate this duty.

19 This matter is currently set for trial on September 24, 2007. In light of this ruling, a full trial on  
20 the merits is no longer necessary. However, further proceedings are needed to determine an appropriate  
21 remedy in this matter, so the September 24 date shall remain on the calendar for such proceedings.  
22 Counsel shall appear for a status conference on **Wednesday, August 29, 2007 at 1:30 p.m.** to discuss  
23 further proceedings.

24 DATED this 22 day of August 2007.

  
RICARDO S. MARTINEZ  
UNITED STATES DISTRICT JUDGE